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IN THE

Supreme Court of the United States

October Term, 1993

NTA GRAPHICS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 3, 1993

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QUESTIONS PRESENTED

1. In crafting an appropriate bargaining unit in a simple, single-product commercial printing operation, should the National Labor Relations Board be permitted to depart, without explanation or justification, from its established rule that the appropriate bargaining unit in even relatively sophisticated operations should include, at a minimum, pressroom and preparatory employees as opposed to isolating a unit of press employees alone?

2. Should such a departure, permitted by the Sixth Circuit in this case, be judicially enforced when the only other such attempted departure was denied enforcement by the Seventh Circuit?

3. Should an administrative agency depart from its prior standards without any explanation of its legal basis or reasons for doing so?

TABLE OF CONTENTS.

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION OF THE SUPREME COURT 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 6

Proceedings Below 6

Statement of Facts 9

REASONS FOR GRANTING THE WRIT 13

1. The Sixth Circuit Has Permitted The National Labor Relations Board To Depart From Prior Standards Without Any Meaningful Explanation Of Its Legal Basis Or Reasons For Doing So, Contrary To Decisions Of This Court And The Fifth, Seventh, Ninth And District Of Columbia Circuits 13

2. The Sixth And Seventh Circuits Are Diametrically Opposed In Their Review Of Efforts By The National Labor Relations Board To Abruptly Scuttle Its Traditional Rules On Bargaining Unit Composition In Commercial Printing Operations Without Reason Or Justification..... 19

CONCLUSION..... 27

APPENDIX:

Opinion of the United States Court of Appeals for the Sixth Circuit (June 21, 1993) A1

Decision and Order of the National Labor Relations Board (July 24, 1992) A5

Order of the National Labor Relations Board (September 25, 1987) A13

Decision and Direction of Election of National Labor Relations Board Regional Director (August 19, 1987) A15

TABLE OF AUTHORITIES

Cases

American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965) 20

Check Printers, Inc., 205 NLRB 33, 83 L.R.R.M. (BNA) 1540 (1973) 7

Community Service Publishing, 216 NLRB 997, 89 L.R.R.M. (BNA) 1261 (1975) 14

Continental Can Co., 217 NLRB 316, 89 L.R.R.M. (BNA) 1283 (1975) 14

Continental Web Press, Inc., 262 NLRB 1395, 110 L.R.R.M. (BNA) 1451 (1982) 6,7

Continental Web Press, Inc. v. NLRB, 742 F.2d 1087 (7th Cir. 1984) ..... *passim*

Earl Litho Printing Co., 116 NLRB 1538, 39 L.R.R.M. (BNA) 1040 (1956) 7

Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1945) 20

Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) 17

Hall-Brooke Hospital v. NLRB, 645 F.2d 158 (2d Cir. 1981) 22

INS v. Cardozo-Fonseca, 480 U.S. 421 (1987) 23

Mallinckrodt Chemical Works, 162 NLRB 387, 64 L.R.R.M. (BNA) 1011 (1966) 21

NLRB v. Brown Food Store, 380 U.S. 278 (1965) ... 20

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990) 16

NLRB v. Engineers Constructors, Inc., 756 F.2d 464 (6th Cir. 1985)..... 22

NLRB v. International Union of Operating Engineers, Local 925, 460 F.2d 589 (5th Cir. 1972)..... 17,18

NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975) 20

NLRB v. Silver Bay Local Union No. 962, International Brotherhood of Pulp Workers, 498 F.2d 26 (9th Cir. 1974)..... 18

NLRB v. United Food & Commercial Workers Union, 484 U.S. 112 (1987)..... 23

NLRB v. Yeshiva University, 444 U.S. 672 (1980) 20,25

R. W. Nowels, 219 NLRB 222, 89 L.R.R.M. (BNA) 1705 (1975) 14

Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945)..... 20

Secretary of Agriculture v. United States, 347 U.S. 645 (1954)..... 15,16

United Automobile Workers of America v. NRLB, 459 F.2d 1329 (D.C. Cir. 1972)..... 17

Watt v. Alaska, 451 U.S. 259 (1981) 23

Statutes

Administrative Procedures Act, 5 U.S.C. §§ 551-59, 704-06:

5 U.S.C. § 557(c) 4,18

5 U.S.C. § 706(2)(E) 5,18

National Labor Relations Act §§ 151-69:

29 U.S.C. § 158(a)(1) and (a)(5) 3

29 U.S.C. § 157 3

29 U.S.C. § 159(a) 3

29 U.S.C. § 160(b) 4,18

29 U.S.C. § 160(e) 4,8,18,20

29 U.S.C. § 160(f) 20

Miscellaneous

Patrick Hardin (BNA), *The Developing Labor Law* 466 (3d ed. 1992) 22

John E. Abodeely, Randi C. Hammer, Andrew L. Sandler (IRU), *The NLRB and The Appropriate Bargaining Unit* 87 (rev. ed. 1981) 22

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PETITION FOR WRIT OF CERTIORARI

Petitioner, NTA Graphics, Inc.,[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on June 21, 1993.

[1] All of the parties to this petition are listed in the caption. NTA Graphics, Inc. has no parent companies or subsidiaries.

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit, which was entered in this matter on June 21, 1993, is styled, *National Labor Relations Board v. NTA Graphics, Inc.* It appears at App. A1.

The Decision and Order of the National Labor Relations Board is reported at 307 N.L.R.B. No. 224 (1992). It appears at App. A5.

The Order of the National Labor Relations Board (September 25, 1987) appears at App. A13.

JURISDICTION OF THE SUPREME COURT

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 21, 1993. A petition for rehearing was denied by the United States Court of Appeals for the Sixth Circuit on August 23, 1993.

An order signed by Justice John Paul Stevens on November 15, 1993 extended to December 6, 1993 the time to file a petition for a writ of certiorari. This petition was filed on or before that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. §§ 151-69, are set forth below:

> Sec. 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." 29 U.S.C. § 157.
>
> Sec. 8. "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a)(1) and (a)(5).
>
> Sec. 9. "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." 29 U.S.C. § 159(a).

Sec. 10. "(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency.... The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28."

....

"(e) The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(b) and (e).

The relevant provisions of the Administrative Procedures Act, 5 U.S.C. §§ 551-59, 704-06, are set forth below:

"All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record...." 5 U.S.C. § 557(c).

"The reviewing court shall—

. . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(E) unsupported by substantial evidence. . . ." 5 U.S.C. § 706(2)(E).

STATEMENT OF THE CASE

Proceedings Below

The United States Court of Appeals for the Sixth Circuit in this case enforced an order of the National Labor Relations Board holding that a unit composed solely of pressroom employees is appropriate for the purposes of collective bargaining. Designation of such a unit is contrary to the Board's established approach to this area. When the Board attempted to vary from this long line of authority in *Continental Web Press, Inc.*, 262 NLRB 1395, 110 L.R.R.M. (BNA) 1451 (1982) (upon which the Board and its Regional Director relied in this case), the United States Court of Appeals for the Seventh Circuit denied enforcement of the Board's order in a decision highly critical of the Board's departure from its prior holdings. *See Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984).

Petitioner, NTA Graphics, Inc. ("Company'" or "Employer"), is a commercial printer, whose single product is advertising inserts for grocery stores. Five departments at a single plant are involved in the production of this product, including the Composition Department, the Pre-Press Department, the Press Department, the Shipping/Receiving Department and the Maintenance Department.

In 1987, the Graphic Communications International Union, Detroit/Toledo/Lansing Local 289, AFL-CIO-CLC ("Union"), filed a petition seeking to represent the Company's employees in collective bargaining. The Union originally petitioned for a unit consisting of the employees in the Pre-Press and Press Departments (*i..e.*, all employees directly involved in lithographic production operations), which is at least arguably consistent with some Board precedent in this area. The Employer, relying upon Board decisions involving printing

operations like those involved here (*i.e.*, simple, single-product offset printing processes), urged a traditional production and maintenance unit. *See, e.g., Check Printers, Inc.*, 205 NLRB 33, 83 L.R.R.M. (BNA) 1540 (1973).

After the hearing on its representation petition, the Union changed its stance and argued that the appropriate unit should include only the employees in the Press Department. The Board's Regional Director adopted the Union's new-found position and decided that the bargaining unit should consist of only pressroom employees (App. A15). As sole legal support for his decision, the Regional Director relied upon the decision by the Board in *Continental Web Press*, 262 NLRB 1395, 110 L.R.R.M. (BNA) 1451 (1982).

Continental Web, however, is an aberration. All prior Board precedent deciding the appropriate units in commercial printing operations fell into two categories: (1) in highly skilled and highly technical operations, the unit consisted of both preparatory and press department employees, *e.g., Earl Litho Printing Co.*, 116 NLRB 1538, 1539, 39 L.R.R.M. (BNA) 1040 (1956) ("the Board has consistently held that all employees engaged in the lithographic production process form a cohesive unit for collective bargaining purposes and has established units which included all such employees without regard to the specific skills of the employees or the departmental nature of the unit sought"); or, (2) in less sophisticated printing operations, a traditional production and maintenance unit is appropriate, *e.g., Check Printers, supra.*

Continental Web is the only decision by the Board paring out a unit of only pressroom employees—a marked departure from this well-established precedent. It was for this reason that the Seventh Circuit refused to

enforce the Board's order, concluding that it was "arbitrary" to "discard . . . without explanation" a "clear policy that seems applicable to this case." *Continental Web*, 742 F.2d at 1093.

In the instant case, the Employer sought review by the Board of the Regional Director's decision to isolate the Press Department employees in a separate bargaining unit. In a cursory split decision, two members of the three-member Board panel decided to deny the request (App. A13). Without any specific discussion of the facts, Members Babson and Johansen simply stated that the "facts here warrant a departure from the traditional unit of lithographic production employees" (*Id.*). Member Stephens dissented, stating that the request should have been granted in order to determine the applicability of the decision of the Seventh Circuit denying enforcement of *Continental Web* (App. A14).

After the Employer engaged in a technical refusal to bargain with the Union, an unfair labor practice charge was filed and disposed of with summary judgment by the Board ordering the Employer to engage in collective bargaining with the Union for only the pressroom employees (App. A5). Pursuant to Section 10(e) of the Act [29 U.S.C. § 160(e)], the Board petitioned the Sixth Circuit for enforcement of its order.

The Sixth Circuit granted the petition for enforcement (App. A1). A panel of the Court, engaging in only the most perfunctory review of the Board's decision, failed to even acknowledge that the Board was departing from established rules of bargaining unit composition in the printing industry. The panel did not mention the Seventh Circuit's decision in *Continental Web*. The panel's failure to even note that the Board was ignoring a long line of precedent in isolating a unit composed only of pressroom employees in this case amply demonstrates the superficiality of its analysis.

Statement of Facts

Press Department employees at the Company are but one segment of a multi-step, functionally integrated printing operation. The terms and conditions of their employment are largely similar to their peers at other steps in the process.

As indicated above, the Company is a relatively simple commercial printing operation whose standard product is a grocery advertising insert to be included in newspapers. These inserts are printed on a standard four-color offset web press. This process is a garden-variety offset printing process, and the Employer is not involved in technically advanced press operations.

In producing the Company's single product, an advertising insert, there is, and must be, a great deal of contact and communication between the Press Department and the other departments that precede and follow it. Any project received from one of the Company's grocery clients begins with copy provided by the customer. The project then proceeds to the Composition Department, where job tickets are made instructing all departments on how the job should be performed. These job tickets are then personally distributed to all the other departments. The Composition Department consults with the Pre-Press Department on color and configurations, spending some one to five hours per day in discussion. It also instructs the Press Department on paper size and quantities. The Shipping/Receiving Department is given directions on the timing and destination of shipments.

The project then proceeds to the Pre-Press Department, where the copy provided by the grocery store is photographed. Strippers employed in the Pre-

Press Department take the photographic flats, strip out the color, and then organize the pages in accordance with the instructions provided by the Composition Department. Plates are prepared and proofread, and those plates are then assembled and organized, and skid labels and bundle tags prepared by the Composition Department are attached.

The order in which various projects are run is determined by the Plant Superintendent. After the run sequence has been determined, the projects are placed in folder racks and made available to the Press Department.

Once the plates are available, employees in the Press Department obtain those plates from the Pre-Press Department, hang them in accordance with instructions on the job ticket prepared by the Composition Department, and then printing begins. The first readable copy is proofread by the pressman against the job tickets prepared by the Composition Department to make sure the pagination is correct. An initial readable copy is also taken back to the Pre-Press Department for proofreading to make sure it conforms to the original copy provided by the customer.

The pressman is assisted by a jogger, who, in addition to providing miscellaneous help, takes the printed product off the end of the press and sweeps up around the press. In sum, the jogger is an unskilled worker who helps the pressman. The Company usually selects its pressmen from the ranks of the joggers.

The Company requires no particular educational or experience levels for its pressmen, its joggers or its employees in other Departments. The Company has no apprenticeship program, nor does it require any special technical schooling of any sort of any of its employees.

The Sixth Circuit stressed that the Company's pressmen supposedly have certain advanced skills, which justify their inclusion in a separate unit. The Court emphasized that the "pressroom is the only department in the Company that designates a skill level promotion after three years experience" (App. A3). In actuality, though, eight of the eleven pressmen were trainees in the first three years who, like the Company's other employees, were simply learning on the job (App. A3). Pressmen have no particular prior educational or job experience requirements and, as mentioned above, are typically drawn from the ranks of the unskilled joggers. Ironically, the Employer's truck drivers are at least required to have a chauffeur's license, and some of the material handlers hold forklift licenses.

Pressmen are given an operating manual prepared by the manufacturer of the press. Other employees in the Pre-Press Department have similar operating manuals for the equipment they use, and the truck drivers are furnished special rules and regulations applicable to them. There is no further evidence of any special expertise required of the pressmen.

Neither the Sixth Circuit nor the Board considered the many similarities in wages, hours and working conditions shared by Press Department and other employees. All employees of the Company, with the exception of top management, are hourly employees. They all punch the same time clock. The hourly rates for the various departments at the time of the hearing were largely consistent as Pre-Press Department employees earned $4.90 to $9.50 per hour, while Press Department employees earned $3.85 to $9.00 per hour.

Employees in all the departments are subject to the same employment policies and receive the same fringe benefits. They are subject to the same disciplinary rules and procedures, including rules on absenteeism, smoking, telephone calls, solicitation and security. They all enjoy the same vacation, life insurance and health insurance benefits. They are subject to the same overtime assignment and compensation programs. They all receive the same shift premium.

The Sixth Circuit, observing that the "main pressroom is physically separated from the other parts of the Company's building by brick walls," suggested that this putative physical isolation justified segregation for collective bargaining purposes. (*Id.*) The Pressroom is, however, the center of the Employer's plant where the pressmen and joggers work for the bulk of their workday, and where employees in several other Departments are taken in the performance of their duties. Adjacent to the Pressroom are the Pre-Press Department, the Shipping/Receiving Department and the maintenance office, and the pressmen are regularly in these other areas for a variety of purposes, for example, visiting the Pre-Press Department when problems arise during a press run.

All employees have an additional reason to be in the Pressroom other than the performance of customary job duties. The time clock is located there, which is punched by everyone. The plant includes a cafeteria and there is a picnic table in front of the plant for use by the employees. These facilities are used by employees in all the production and maintenance departments. A locker room in the Pressroom is used by employees in the Press, Shipping/Receiving and Maintenance Departments.

REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit Has Permitted The National Labor Relations Board To Depart From Prior Standards Without Any Meaningful Explanation Of Its Legal Basis Or Reasons For Doing So, Contrary To Decisions Of This Court And The Fifth, Seventh, Ninth And District Of Columbia Circuits.

For many years and in several cases, the National Labor Relations Board has held that an appropriate bargaining unit in the printing industry must include at least those preparatory and press employees involved in the lithographic production process:

> "For many years, through many changes of Administration, the Board has been saying that pressmen and preparatory employees compose one unit in lithographic printing plants. See, e.g., *NLRB v. Lord Baltimore Press, Inc.*, 370 F.2d 397, 400 and n.4 (8th Cir. 1966); *Meyer Label Co.*, 232 N.L.R.B. 933 (1977), rev'd 597 F.2d 18 (2d Cir. 1979); *Moore Business Forms, Inc.*, 216 N.L.R.B. 833, 834 (1975); *George Rice & Sons*, 212 N.L.R.B. 947 (1974); *Paramount Press, Inc.*, 187 N.L.R.B. 586 (1970); *Sherwin-Williams Co.*, 173 N.L.R.B. 316 (1968); *A.B. Hirschfeld Press, Inc.*, 140 N.L.R.B. 212, 216 (1962); *Allen, Lane & Scott*, 137 N.L.R.B. 223, 225 (1962) ('long-standing rules'); *Earl Litho Printing Co.*, 116 N.L.R.B. 1538, 1539 (1956) ('The Board has consistently held that all employees engaged in the lithographic production process form a cohesive unit for collective-bargaining purposes and has established units which included all such employees without regard to the specific skills of the employees or the departmental nature of the unit sought'); *A.B. Hirschfeld Press, Inc.*, 96 N.L.R.B. 1068, 1069 (1951)

> ('absent unusual circumstances, all employees engaged in the lithographic process form an indivisible entity for the purposes of collective bargaining'); *Johnson City Publishing Co.*, 81 N.L.R.B. 1341, 1342 (1949); *Manz Corp.*, 79 N.L.R.B. 211, 212 (1948); cf. *NLRB v. Krieger-Ragsdale & Co.*, 39 F.2d 517, 520 (7th Cir. 1967); *National Blank Book Co.*, 246 N.L.R.B. 921 (1979); *Olin Corp.*, 229 N.L.R.B. 793 (1977). The earlier cases are more emphatic on this score than the later ones, but, so far as we can tell, this is only because the policy had become so well established that allusion was all that was required to invoke it. See, e.g., *Confort & Co.*, 267 N.L.R.B. No. 47, at p. 5 (Aug. 25, 1983) (citing *Allen, Lane & Scott, supra*)." *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1092 (7th Cir. 1984).

See also R. W. Nowels, 219 NLRB 222, 89 L.R.R.M. (BNA) 1705 (1975); *Continental Can Co.*, 217 NLRB 316, 89 L.R.R.M. (BNA) 1283 (1975); *Community Service Publishing*, 216 NLRB 997, 89 L.R.R.M. (BNA) 1261 (1975).

In this case, the Board ignored this long line of authority, instead plucking out a small unit of pressroom employees alone. The Board conceded that it was departing "from the traditional unit of lithographic production employees" (App. A13). The only reason given for this departure was that there was "insufficient evidence of cohesiveness" between the preparatory and pressroom employees. (*Id.*) The Board failed in any respect to identify what dissimilarities in employment conditions it found to be significant in finding that the pressroom employees were not cohesive with other employees. It failed to explain what factors

led it to conclude that prior rules on the composition of bargaining units in the printing industry should not be followed.

The Seventh Circuit has refused to enforce virtually the same order of the Board in essentially identical circumstances. Holding to well-subscribed principles of federal administrative law, the Court refused to countenance the Board's attempts to arbitrarily vary from existing rules without explanation:

> "The Board is allowed to reverse course. But it has got to give reasons, or else the reversal is arbitrary. This general principle of administrative law [citations omitted], is fully applicable to unit determinations. [Citations omitted.] The Board gave no reasons for changing course in this case—and in fact denied doing so." *Continental Web*, 742 F.2d at 1093.

The Court noted that "by a course of adjudications extending over many years, the Board succeeded in developing a clear policy that seems applicable to this case," which was to include both press and preparatory employees in a bargaining unit. *Id.* The Court then held that "to discard the policy without explanation would be arbitrary." *Id.*

Nearly 40 years ago, this Court established as a fundamental precept of federal administrative law that administrative agencies must explain their reasons for departing from previously recognized policies and standards. In *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954), the Court charged administrative agencies with the following duty:

> "[T]he Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision . . . In

> short, the Commission has not explained its decision 'with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end, we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi jurisdictional findings of an administrative agency. [Citations omitted.] We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 510-511." *Id.* at 653-54.

In a dissenting opinion in *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990), Justice Blackmun criticized the National Labor Relations Board for its departure, "without explanation, from principles announced and reaffirmed in its prior decisions." *Id.* at 799. Justice Blackmun reasoned that requiring an agency to provide some explanation of its rationale permits the courts to provide sensible limits on the authority of an unelected bureaucracy without needlessly invading the discretion that should be accorded expert administrative agencies:

> "But courts can and should review agency decisionmaking closely to ensure that an agency has adequately explained the bases for its conclusions, that the various components of its policy form an internally consistent whole, and that any apparent contradictions are acknowledged and addressed. This emphasis upon the decisionmaking *process* allows the reviewing court to exercise meaningful control over unelected officials without second-guessing the sort of expert judgments that a court may be ill equipped to make. Such an approach also affords the agency a broad range of discretion. Confronted with a court's conclusion that two of its policy pronouncements are inconsistent, the agency may choose for itself which path to follow, or it may attempt to explain why no contradiction actually exists." *Id.* at 800.

As the District of Columbia Circuit has observed, "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedence without discussion, it may cross the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

This basic tenet of administrative law has been repeatedly applied in reviewing decisions of the National Labor Relations Board. When the Board abandoned its prior rule that an adverse inference may be drawn against a party who has relevant evidence within his control which he fails to produce in *United Automobile Workers of America v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972), the Court reversed the Board because "the agency obviously has not followed the numerous precedents which seem to require use of the adverse inference rule." *Id.* at 1341. Recognizing "an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them," the District of Columbia Circuit found it arbitrary for the Board to choose without explanation to ignore prior decisions.

In *NLRB v. International Union of Operating Engineers, Local 925*, 460 F.2d 589 (5th Cir. 1972), the Court refused to enforce a Board order holding a union business manager personally liable for back pay, contrary to prior Board decisions. The Court recognized that the Board could adopt new approaches, but could only do so explicitly with a stated rationale:

> "It is, of course, true that the Board is free to adopt new rules of decision and that the new rules of law can be given retroactive application. Nevertheless,

> the Board may not depart sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case. . . . Here, the Board's departure from its prior rule was wholly unexplained in its decision." *Id.* at 604.

The Ninth Circuit has adopted the same approach as the Fifth Circuit. *See NLRB v. Silver Bay Local Union No. 962, International Brotherhood of Pulp Workers,* 498 F.2d 26, 29 (9th Cir. 1974).[2]

The Sixth Circuit in this case impermissibly allowed the Board to unilaterally abandon prior rules without explanation, ignoring fundamental principles of federal administrative law set out by this Court and observed by several circuits. The Board cavalierly abandoned traditional rules for reasons not explained, save in the conclusory label of "insufficient evidence of cohesiveness." The petition for writ of certiorari in this case should be granted to bring the Sixth Circuit, and the Board, into conformity with basic maxims of federal administrative law requiring agencies to simply explain why they are reaching the conclusions they reach, particularly when those conclusions are at odds with previous decisions of the same agency.

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[2] That the Board is required to set forth reasons for its abandonment of prior precedents is reinforced in relevant statutes. The Board's unfair labor practice proceeding in this case is a formal adjudication, governed by the Administrative Procedures Act. That act requires "findings and conclusions, and the reasons or bases therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c). The National Labor Relations Act commands that unfair labor practice proceedings must be conducted formally in accordance with the federal rules of evidence, and both the National Labor Relations Act and the Administrative Procedures Act call for reversal of agency determinations that are not supported by substantial evidence. See National Labor Relations Act, 29 U.S.C. § 160(b) and (e); Administrative Procedures Act, 5 U.S.C. § 706(2)(E).

2. The Sixth And Seventh Circuits Are Diametrically Opposed In Their Review Of Efforts By The National Labor Relations Board To Abruptly Scuttle Its Traditional Rules On Bargaining Unit Composition In Commercial Printing Operations Without Reason Or Justification.

The National Labor Relations Board in this case severed out a small unit of Press Department employees, divorcing them for the purposes of collective bargaining from the preparatory employees in the Composition and Pre-Press Departments who produce the job packets and plates that are then physically used by the Press Department employees to print grocery inserts. While preparatory and press employees have long been held to be the appropriate bargaining unit in commercial printing operations, the Board summarily concluded "that the facts here warrant a departure from the traditional unit of lithographic production employees" (App. A13). With respect to the "facts" that were said to justify variation from the Board's usual principles, the Board cryptically observed only that there was "insufficient evidence of cohesiveness" between the preparatory and pressroom employees (*Id.*). The Sixth Circuit searched through the record to find some evidence to support the Board's decision, and then purported to do so by parroting a few unjustified inferences drawn by the Board from generally erroneous factual findings, all offered in support of the Court's ultimate conclusion "that the Board did not abuse its discretion" (App. A3).

In reviewing the Board's determinations of appropriate bargaining units, this Court has stated that "we accord great respect to the expertise of the Board when its conclusions are rationally based on articulated

facts and consistent with the Act." *NLRB v. Yeshiva University,* 444 U.S. 672, 691 (1980). Yet, the Court has cautioned that limited judicial review of Board decisions does "not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases." *NLRB v. Brown Food Store,* 380 U.S. 278, 290-91 (1965). Indeed, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia." *American Shipbuilding Co. v. NLRB,* 380 U.S. 300, 318 (1965).

The National Labor Relations Act itself calls for effective judicial review of Board decisions. *See* National Labor Relations Act, Section 10(e) and (f), 29 U.S.C. § 160(e) and (f). While the courts have been deliberately slow to overrule the Board and other administrative agencies, "they are not constrained to 'sheer acceptance' of the Board's conclusions," *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 803 (1945), *quoting Eastern-Central Motor Carriers Ass'n v. United States,* 321 U.S. 194, 209 (1945), nor are they obliged " 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act." *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 266 (1975), *quoting Brown Food Store,* 380 U.S. at 291.

Utilizing these standards in a case indistinguishable from this, the Seventh Circuit in *Continental Web Press, Inc. v. NLRB,* 742 F.2d 1087 (7th Cir. 1984), denied enforcement of the Board's attempt to gerrymander a bargaining unit of pressroom employees only, as opposed to the traditional lithographic unit of pressroom and preparatory employees. The Court noted that, "by a course of adjudications extending over many years, the Board succeeded in developing a clear policy that seems applicable to this case; and to discard the policy without explanation would be arbitrary." *Id.* at 1093.

Segregating a small unit of pressroom employees, and divorcing them from the pre-press and other employees involved in the Company's production and maintenance operations contravenes federal labor policy that has long frowned upon a multiplicity of small bargaining units in a single work force. As the Seventh Circuit noted in *Continental Web,* multiple bargaining units create the possibility that an employer will have to engage in a costly set of separate negotiations with a number of different unions. *See Continental Web,* 742 F.2d at 1090. Further, different units with different representatives create multiple possibilities for work stoppages, which create burdens for far more than the employer.

> "The different unions may have inconsistent goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike, thus imposing costs on other workers as well as on the employer's shareholders, creditors, suppliers, and customers" *Id.*

Additionally, "breaking up a work force into many small units creates a danger that some of them will be so small and powerless that it will be worth no one's while to organize them, in which event the members of these units will be left out of the collective bargaining process." *Id.* Thus, in a case such as the present, surgically excising out a unit of only pressroom employees may have the effect of disenfranchising smaller and less powerful groups, like the Employer's material handlers and others.

Because of these considerations, the Board has come to more critically scrutinize efforts to sever craft units out of larger industrial units. *See Mallinckrodt Chemical Works,* 162 NLRB 387, 64 L.R.R.M. (BNA) 1011 (1966).

Indeed, it has been recognized that "the industrial unions forcefully argue that separate bargaining units jeopardize the right of all employees in that a strike by the skilled workers could effectively shut down the employer's entire operation." John E. Abodeely, Randi C. Hammer, Andrew L. Sandler (IRU), *The NLRB and The Appropriate Bargaining Unit* 87 (rev. ed. 1981). A leading labor law treatise notes "that the *Mallinckrodt* standard usually results in a denial of craft severance." Section of Labor and Employment Law, American Bar Association, Patrick Hardin (BNA), *The Developing Labor Law* 466 (3d ed. 1992).

In this case, the Board with the endorsement of the Sixth Circuit swims contrary to a torrent of precedent in the skilled trades, including the printing industry, and establishes a bargaining unit composed solely of pressroom employees, even excluding the preparatory employees that have always been a part of the traditional lithographic bargaining unit. The Sixth Circuit has itself noted in other cases that such a marked departure from the traditional rules specifically applied in the printing industry, as well as general principles of federal labor law policy the Board has employed in all trade units, deserves the closest degree of scrutiny:

> "However, despite this broad discretion, '[c]areful' judicial scrutiny of the Board's action is necessary . . . in the face of accusations of failure to abide by precedent since the courts have an obligation to ensure that administrative agencies adhere to enumerated policies and procedures." *NLRB v. Engineers Constructors, Inc.*, 756 F.2d 464, 467 (6th Cir. 1985), *quoting Hall-Brooke Hospital v. NLRB*, 645 F.2d 158, 160 (2d Cir. 1981).

This Court has also looked with a sharper eye at variations by administrative agencies from established policies. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987), *quoting Watt v. Alaska*, 451 U.S. 259, 273 (1981). *See also NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987).

In *Continental Web*, the Seventh Circuit concluded that the Board's unprecedented attempt to isolate a unit of pressroom employees from all others could not withstand such close examination. The Court found that the alignment of interests between the pressroom and preparatory employees was substantial, that the differences between the two, as portrayed by the Board, were insignificant, and that paring out a unit composed solely of pressmen was arbitrary. The Court noted that the preparatory and pressroom employees worked in separate but adjacent work areas, as is the case here. Pressroom employees visited the preparatory department to pick up plates at Continental Web, as they do at the Employer's plant. Pressmen and preparatory employees at Continental Web were paid about the same, and pre-press employees at the Company earn from $4.90 to $9.50 while press employees earn $3.85 to $9.00. Press and preparatory employees at Continental Web enjoyed the same fringe benefits and worked the same basic number of hours per week, which is also true in this case.

The Board in *Continental Web* emphasized certain differences between press and preparatory employees, which the Seventh Circuit found to be insignificant. Many of the same unimportant distinctions were relied

upon by the Sixth Circuit and the Board in this case in order to drive a fictional wedge of divisiveness between press and pre-press employees.

Pressmen at Continental Web wore smocks, while preparatory employees did not, and the Sixth Circuit in this case noted as significant the fact that pressroom employees "wear distinctive uniforms" (App. A4). The Seventh Circuit scoffed at this inconsequential distinction, which was simply attributable to the fact that "the pressman's work is dirtier." 742 F.2d at 1092. The Seventh Circuit pointed out that the Board and the Regional Director in "[t]heir opinions recite the differences in working conditions that we have mentioned . . . and then tack on a conclusion that therefore the pressmen have a sufficient community of interest to be a separate unit." *Id.* The Court summarized the Board's lack of analysis succinctly: "We understand everything but the 'therefore.' " *Id.*

There were, in fact, more significant differences between the preparatory and press department employees in *Continental Web* than exist in this case. Continental Web preparatory and press department employees had different supervisors, while both groups of employees in this case were supervised by the Plant Superintendent. The two groups had different employee handbooks at Continental Web, while the same handbook and the same employment policies govern both pre-press and press department employees at the Company. Thus, to the extent any differences exist between this case and *Continental Web*, the pre-press and press department employees here are more closely allied. In legally indistinguishable situations, the Sixth Circuit in this case permitted and the Seventh Circuit in *Continental Web* rejected the Board's arbitrary attempt to isolate a unit of only pressroom employees. The Seventh Circuit

pointed out that "[a] number of cases explicitly refuse to sever preparatory employees from pressmen—the severance performed in this case." 742 F.2d at 1092-93.

The Sixth Circuit in this case found evidence "to support a conclusion that the pressmen at the Company enjoy a distinct community of interests" (App. A3). The Seventh Circuit found the supposed distinctions to be "small and unimportant," *Id.* at 1092, concluding that it was irrational to separate pressroom employees from preparatory employees, as the Sixth Circuit has done in this case:

> "Like [the employer] we find it difficult to understand why there should be separate units for pressmen and preparatory employees. . . . It is as if the Board had said that the workers at the beginning of an assembly line belong in a different bargaining unit from the ones at the end; for preparation and printing are successive stages in a single lithographic production process." *Id.* at 1091.

The Seventh Circuit meaningfully examined the real factors that might contribute to or detract from a community of interest between the two employee groups, as opposed to the Sixth Circuit's and the Board's superficial labeling process, which finds critical differences in matters such as one group of employees working around ink wearing smocks and the two groups of employees having different numbers on their timecards. The Board's approach in this case, seconded by the Sixth Circuit, is reminiscent of its approach in a prior case decided by this Court in which the Court criticized the Board's "absence of factual analysis" as reflecting "the Board's view that the managerial status of particular faculties may be decided on the basis of conclusory rationales rather than examination of the facts of each case." *NLRB v. Yeshiva University,* 444 U.S. 672, 691 (1980).

Close examination of the truly important employment factors that cause employees to share similar employment interests compelled the Seventh Circuit in *Continental Web* to conclude that separating pressroom employees out for inclusion in an isolated bargaining unit—apart from the skilled preparatory employees who are a part of the same lithographic process—is unmistakably arbitrary and unreasonable, as well as being contrary to the Board's "clear policy that seems applicable to this case." 742 F.2d at 1093. The Sixth Circuit in this case failed to review the Board's departure from established practices in the printing industry with the exacting scrutiny called for by this Court and other circuits, and thus reached a decision that is in unmistakable conflict with the Seventh Circuit. The Court should grant the petition for a writ of certiorari in this case to reconcile the manifest differences between the Seventh and Sixth Circuits.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit in this case approving the National Labor Relations Board's stark and unexplained variation from traditional rules on the composition of bargaining units cannot be reconciled with the Seventh Circuit's refusal to sanction such a departure. The Sixth Circuit is also in conflict with the teachings of this Court and the holdings of several circuits requiring administrative agencies to at least set forth a rationale for varying from established rules and standards. The net effect of the Sixth Circuit's failures is to turn back the progressive tide of federal labor law policy that seeks to discourage the proliferation of multiple bargaining units in a single, small work force.

The petition for a writ of certiorari should be granted to allow the Court the opportunity to demand that the National Labor Relations Board employ consistent approaches to the definition of bargaining units under the National Labor Relations Act, and the further opportunity to reinforce the proposition that federal administrative agencies must either follow existing standards or alter them for justifiable reasons enunciated by the agency.

Respectfully submitted,

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December 3, 1993

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 21, 1993)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be *prominently* displayed if this decision is reproduced.

No. 92-6085

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NTA GRAPHICS, INC.,
Respondent.

ORDER

BEFORE: MERRITT, *Chief Judge*; GUY and BATCHELDER, *Circuit Judges.*

This is an unfair labor practice proceeding in which the National Labor Relations Board (NLRB or Board) makes an application for enforcement of its order to the

respondent, NTA Graphics (NTA or the Company), issued on July 24, 1992, and reported at 307 N.L.R.B. 224 (1992). The parties have waived oral argument. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

NTA is a printing company whose primary product is newspaper advertising inserts. The Board found NTA guilty of unfair labor practices as a result of the Company's refusal to bargain with a certified bargaining unit. Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 151, et seq. The Company responded by challenging the composition of the bargaining unit. Stated another way, the Company argues that it is under no obligation to bargain with the Union because no labor representative has been chosen in a unit that is appropriate for the purposes of collective bargaining. Therefore, the Company's argument continues, it could not have engaged in an unfair labor practice.

The bargaining unit in question was determined by an election conducted on September 25, 1987. The appropriate unit was defined as "all full-time and regular part-time pressroom employees employed by the Employer at its Toledo, Ohio, facility, excluding all clerical employees and all professional employees, guards, and supervisors as defined in the Act and all other employees." The Company's contention throughout the unionization process has been that the only appropriate unit is an all-employee unit, not one limited to lithographic production employees.

The standard of review is for abuse of discretion. *NLRB v. First Union Management, Inc.*, 777 F.2d 330, 333 (6th Cir. 1985) (review of such a decision "extremely narrow"); *Indianapolis Glove Co. v. NLRB*, 400 F.2d 363, 366 (6th Cir. 1968). *But see NLRB v. Engineers Constructors, Inc.*, 756 F.2d 464, 467 (6th Cir. 1985) (despite this broad discretion, careful judicial scrutiny of the Board's action is necessary).

In determining whether the unit sought is appropriate, the Board generally seeks to ascertain whether the employees share a "community of interest." *See Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962) (community of interest factors). Upon review, we conclude that the Board did not abuse its discretion. The record supports a finding of differences in working conditions sufficient to support a conclusion that the pressmen at the Company enjoy a distinct community of interests. The Company is divided into five functional divisions. The pressroom is one of the departments. In that department, one rises to the level of a "pressman" after three years experience. Before that time, one is considered a "trainee." *Cf. Check Printers, Inc.*, 205 N.L.R.B. 33 (1973) (inappropriate lithographic production unit because of the relatively simple and repetitive nature of the printing product and because the lithographers were trained within a short time). The pressroom is the only department in the Company that designates a skill level promotion after three years experience. This is evidence of a difference in skills and working conditions. *See Armco, Inc. v. NLRB*, 832 F.2d 357, 362-63 (6th Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988). The main pressroom is physically separated from the other parts of the Company's building by brick walls. This is evidence of a lack of "functional integration." In

other words, it tends to suggest that there was not any significant interchange or transfer among employees of the various departments. Furthermore, the record reveals that the pressroom employees have separate supervision, may work a different schedule, wear distinctive uniforms, and are paid on a different scale. All these facts point to a sufficient "community of interests" that justifies the choice of bargaining unit in this case.

Accordingly, the application for enforcement of the order issued by the National Labor Relations Board is hereby granted. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF
THE COURT

/s/ LEONARD GREEN
Clerk

ISSUED AS MANDATE: 9/1/93
COSTS: $126.00
FILING FEE . . . . . $
PRINTING . . . . . $
TOTAL . . . . . $

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Dated July 24, 1992)

SDR

307 NLRB No. 224

D—2924
Toledo, OH

Case 8—CA—24277

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NTA GRAPHICS, INC.

and

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, DETROIT-TOLEDO LOCAL 289, AFL—CIO—CLC

DECISION AND ORDER

On February 25, 1992, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 8—RC—13648. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g);

Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On June 16, 1992, the General Counsel filed a Motion for Summary Judgment. On June 18, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, an Ohio corporation with an office and place of business in Toledo, Ohio, has been engaged in high volume lithographic commercial printing. Annually, the Respondent sold and shipped from its facility goods valued in excess of $50,000 directly to points outside the State of Ohio. We find that the Respondent is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Certification*

Following the election held September 25, 1987,[1] the Union was certified on September 9, 1991, as the collective-bargaining representative of the employee in the following appropriate unit:

> All full-time and regular part-time press room employees employed by the Employer at its Toledo, Ohio, facility, excluding all clerical employees and all professional employees, guards, and supervisors as defined in the Act and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

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[1] On October 2, 1987, the Respondent filed objections and on October 22, 1987, the Regional Director issued a Supplemental Decision and Order Directing Hearing on Objections and Challenge Ballots ordering that the issues raised be set for hearing and that the matter be consolidated with an unfair labor practice hearing in Case 8—CA—20167. Thereafter, charges in Case 8—CA—20458 and

(Footnote continued on following page.)

B. *Refusal to Bargain*

Since January 8, 1992, the Union has requested the Respondent to bargain and since January 15, 1992, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after January 15, 1992, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to

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(Footnote continued from preceding page.)

8—CA-20732 were consolidated for hearing with the above cases. On October 31, 1989, the administrative law judge found that the Respondent engaged in certain violations of Sec. 8(a)(1) and (3) but found no merit to other 8(a)(1), (3), and (5) allegations. On April 4, 1990, the case was remanded to the administrative law judge for further findings of facts and credibility resolutions. On July 5, 1990, the administrative law judge issued a Supplemental Decision clarifying certain of his credibility findings in the earlier decision.

The parties filed additional exceptions and briefs and on July 31, 1991, the Board issued a Decision and Order, 303 NLRB No. 155, finding that the Respondent violated Sec. 8(a)(1) and (3) and ordering that the unilateral change in shift hours allegation be held in abeyance and that jurisdiction of that issue be retained pending the opening and counting of the challenged ballots in the representation proceeding.

The representation proceeding was severed from the unfair labor practice proceedings and remanded to the Regional Director. A revised tally of ballots was issued and the Union was certified. (See 305 NLRB No. 108.)

cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, NTA Graphics, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Graphic Communications International Union, Detroit-Toledo Local 289, AFL—CIO—CLC, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time press room employees employed by the Employer at its Toledo, Ohio, facility, excluding all clerical employees and all professional employees, guards, and supervisors as defined in the Act and all other employees.

(b) Post at its facility in Toledo, Ohio, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. July 24, 1992

JAMES M. STEPHENS
Chairman

DENNIS M. DEVANEY
Member

JOHN N. RAUDABAUGH
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

D—2924

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Graphic Communications International Union, Detroit-Toledo Local 289, AFL—CIO—CLC, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time press room employees employed by the Employer at its Toledo, Ohio, facility, excluding all clerical employees and all professional employees, guards, and supervisors as defined in the Act and all other employees.

NTA GRAPHICS, INC.
(Employer)

Dated: _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1240 East 9th Street, Room 1695, Cleveland, Ohio 44199-2086, Telephone 216—522—3729.

ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Dated September 25, 1987)

Case 8-RC-13648

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

NTA GRAHICS, INCORPORATED,
Employer,

and

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, DETROIT/TOLEDO/LANSING LOCAL 289, AFL-CIO-CLC,
Petitioner.

ORDER

Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review. In denying review the Board agrees with the Regional Director that the facts here warrant a departure from the traditional unit of lithographic production employees as there is insufficient evidence of cohesiveness between the preparatory employees and pressroom employees to warrant a broader unit. We note, in any event, that the Employer contended that the only appropriate unit was an all-employee unit, not one limited to lithographic production employees.

WILFORD W. JOHANSEN, *Member*
MARSHALL B. BABSON, *Member*

Member Stephens, dissenting:

I would grant the request for review in order to read the record and determine the applicability of *Continental Web Press v. NLRB*, 742 F.2d 1087 (7th Cir. 1984).

JAMES M. STEPHENS, *Member*

Dated, Washington, D.C., 25 September 1987.

DECISION AND DIRECTION OF ELECTION OF NATIONAL LABOR RELATIONS BOARD REGIONAL DIRECTOR

(Dated August 19, 1987)

Case No. 8-RC-13648

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

NTA GRAPHICS, INCORPORATED[1]
Employer

and

GRAPHIC COMMUNICATIONS INTERNATIONAL
UNION, DETROIT/TOLEDO/LANSING
LOCAL 289, AFL-CIO-CLC[2]
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[3]

> All full-time and regular part-time press room employees employed by the Employer at its Toledo, Ohio, facility, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act and all other employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements.

Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Graphic Communications International Union, Detroit/Toledo/Lansing Local 289, AFL-CIO-CLC.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Off. of Reg. 8, Suite 1695, 1240 E. 9th Street, Cleveland, Ohio on or before August 26, 1987. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washington by September 2, 1987.

Dated August 19, 1987

(SEAL)

at Cleveland, Ohio

/s/ FREDERICK J. CALTRELLO
Regional Director, Region

[1] The Employer, whose name appears as amended at the hearing, is engaged in high volume lithographic commercial printing. Currently, it produces newspaper inserts for the grocery industry. Although the record does not disclose the exact number, there are approximately 40 employees in the unit of press employees found appropriate herein.

[2] The name of the Petitioner appears as amended at the hearing.

[3] The Petitioner seeks a unit of all press room employees. In its petition the Petitioner requested a unit of all pre-press department and press department employees. However, in its post-hearing brief the Petitioner moved to amend the petition to reflect the unit sought as limited to press room employees. Inasmuch as the motion has been served on the Employer and no objection thereto has been raised, the Petitioner's motion is hereby granted. Herein and in the record, "press room" and "press department" are synonymous terms.

Contrary to the Petitioner, the Employer asserts that an appropriate unit must include all production and maintenance employees. The unit urged by the Employer would include press room, pre-press department, composition department, shipping and receiving department, and maintenance department employees.

As noted above the Employer produces a grocery advertising insert to be included in various newspapers. These inserts are printed on a four color Harris Web offset press.

The Employer's product begins with a format provided by the customer which has its art work and typesetting either specified in advance or already in place. This model copy proceeds to the composition department

where "job tickets" are created instructing all other departments involved on how the particular assignment should be performed. The composition department consults with the pre-press department on color and other printing configurations. The composition department also gives to the press department instructions on paper size and quantities to be produced. The shipping and receiving department is given, via the job tickets, directions on the timing and destination of the shipments.

The five departments into which the Employer's work force is divided are each located in a separate, well defined area. A floor plan was introduced into evidence at the hearing showing that the composition department has offices in the front of the building. The pre-press area is across a hallway from the composition offices. The main press room is located in the approximate center of the building and is segregated by brick walls from all other areas of the building. There are two main entrances to the press room—one to the east, which opens into the shipping and receiving area, and one to the west, which opens into an area close to the employees' cafeteria. The shipping and receiving employees work in the area designated as the storage and high bay areas. The maintenance department is located in an unused secondary press room.

Press mechanics, as part of the maintenance department, are located in the maintenance and rebuilding room located in the north end of the building. In the maintenance department are included janitors, press mechanics and an individual who constructs wooden pallets. The shipping and receiving department is manned by drivers and material handlers. The composition department has one typesetter/layout and

one dispatch/layout employee. The pre-press department has cameramen, strippers and platers; and the press room has joggers, a pressman trainee, and press operators.

For the reasons set out below I have determined that the unit sought by the Petitioner herein, limited as it is to press department employees, constitutes a unit appropriate for purposes of collective bargaining.

The record taken as a whole discloses little contact between press employees and employees in the other departments. That is not to say that there is no contact, as the discussion below will disclose; however, such contact, particularly in light of other relevant factors, is not sufficient to sustain a finding that the press room employees do not share a community of employment interests separate and distinct from those of the other employees.

The record reflects that composition employees have virtually no day-to-day contact with press room employees. Composition employees, as noted above, prepare job tickets which contain the information needed to run a particular project. This information includes the number of copies, the size of the paper and other information needed by various departments. The job ticket is attached to the art work and the model of the advertisement which is given to the cameramen and eventually attached to the plate which the press operator receives from the platemaker.

In addition, the record does not disclose any contact between truck drivers working from the shipping and receiving department and the press room employees. Although material handlers frequently bring paper rolls

into the press room and remove pallets of finished material, they are in the press room for but a few minutes at most on each trip.

The press mechanics from the maintenance department enter the press room only when they are working on the presses. Work on the presses is not frequent, because minor maintenance is performed by the press operators themselves. The press mechanics work on the machines only when they are being installed or if there is a major malfunction or electrical problem. Furthermore, the mechanics are stationed in a room at the rear of the building which contains their tools and hoists. It is noteworthy that the mechanics are also engaged in the rebuilding of press units which the Employer then markets to other concerns.

The janitors who clean in the press room from one to three time daily do so only in the center of the room and only for a few minutes at a time. The press operators perform cleanup in and around the presses.

The record reflects that the Employer's pallet maker devotes his time to building wooden pallets in the area located in the high bay. He has no day-to-day contact with the press room employees except when he is temporarily assigned to the jogger position when the Employer's regular jogger is absent. The record testimony discloses that this occurs approximately four times a year. The jogger's function is to convey the printed product from the presses to the pallets which are placed in the press room for that purpose. In addition, the jogger cleans in and around the presses.

The record also discloses that the various departments are separately supervised. There is no common supervision except at the highest levels of management,

which is not significant on a day-to-day basis. The press room is supervised by Scott Shaffer on the day shift and Hollis Shaffer on the third shift. Each supervisor works approximately 10 hours a day. The press room supervisors have an office in the press room.

The composition department employees are supervised by David Tremonti, the Employer's vice president and operations manager. Tremonti also supervises the janitor and press mechanics. The pallet maker works principally by himself. The shipping and receiving employees are generally supervised by Randy Perdue who has an office in the storage area; and the pre-press area is supervised by Beryl Grisier.

The skills of the employees in the various departments vary significantly insofar as the nature of the skills possessed and the levels of skill required to perform the particular tasks. The record is amply clear that the press operators are highly skilled employees performing traditional tasks unique to their particular classification. They are required to be skilled in the setup of the press which involves the adjustment of colors on the four color presses, the alignment of images, the adjustment of paper tensions, and the control of paper speed, and must be prepared to perform minor maintenance on the machines. The record is clear that approximately three years is required properly to train a press operator, and pressmen who do not have three years of experience are considered trainees. Currently, there is one trainee working at the Employer's facility. Press operators work as a team with a jogger who is learning the craft skill on the job. The record discloses that press room employees have been hired with experience or are trained on the job by Hollis Shaffer, the third shift supervisor.

The press room is the only department with a "trainee" classification. In addition, no other classification of the Employer's employees has any particular training.

The mechanics in the maintenance department are hired with prior experience, and there is record evidence that the mechanics previously worked for an outside contractor with whom the Employer had a contract for press maintenance. When the contract terminated, the Employer hired the press mechanics who had previously been employed by the independent contractor. Janitors have little skill and no experience when hired, and the pallet maker saws boards and nails them together with an air powered nail gun. In the shipping and receiving department the material handlers either had outside experience or have learned on the job. Some of them have licenses which they obtained elsewhere. They operate forklifts in their work. The truck drivers obviously are licensed under the state and have chauffeurs' licenses.

The evidence adduced at the hearing includes a manual of some 70 pages of detailed and complex technical information on the operation and maintenance of the Employer's presses. There are no similar manuals or operational guides for the other departments.

The press operators, while not as highly paid as the head mechanic, are clearly among the highest paid employees.

Starting times of the various departments are staggered and correspond to the particular needs of the department. The press room operates on a fixed schedule of five, eight hour days; the press room employees may work fewer than five days per week depending on the volume of business. Composition employees have a varied and irregular schedule, and mechanics and certain

employees in the shipping and receiving department work only on the day shift. Other shipping and receiving employees work a three shift schedule, and there is always a janitor on duty around the clock.

The record discloses that press room employees are not permitted to use certain areas of the building because they are often covered with ink and there is a danger that they will damage carpeting in the office area. Consequently, they are restricted to certain areas and to certain locker room areas. Moreover, other employees are forbidden to enter the press area. Press room employees wear uniforms, in contrast to employees in other departments who may appear in mufti. The truck drivers wear uniforms which differ in color from those of press room employees.

The record does not reflect any significant employee interchange and the only interchange in the press room is on the jogger level as described above. Unskilled workers from other departments may substitute for the jogger when he is absent or on vacation.

Based on the above and the totality of the record, I am convinced that the unit of press room employees sought by the Petitioner constitutes an appropriate unit for the purposes of collective bargaining. The unit of press room employees constitutes a traditional lithographic unit in the printing industry, even though in this case, based on the particular facts, the pre-press employees have not been included.

I am not persuaded that the fact situation encountered in the instant case is analogous to the facts of cases cited by the Employer to support its contention that an appropriate unit herein must contain all of the production and maintenance employees.

For example, the pressmen in *Check Printers, Inc.*, 205 NLRB 33 (1973), were able to aquire the desired level of skill for press work in approximately two to three months. In contrast, the pressmen in the instant case undergo a three year training program, and those who have not completed the program are classified as trainees. In *Check Printers*, the Board found that the pressmen were involved in relatively simple and repetitive operations and that they were not the type of printing employees the Board has found to constitute an appropriate separate unit in a commercial printing establishment. In addition, the pressmen in *Check Printers* also performed other duties such as operating cutting machines located in the bindery department.

I do not find that *Texas Color Printers, Inc.*, 210 NLRB 30 (1974) is apposite to the fact situation herein. In *Texas Color*, the Board refused, in a commercial printing operation, to carve out a unit composed only of shipping and receiving employees. Clearly, the considerations involved in that determination have little bearing on whether the pressmen herein have a separate and distinct community of employment interests which would render a unit limited to them appropriate.

I believe that the facts in the instant case more closely parallel those in *Continental Web Press, Inc.*, 262 NLRB 1395 (1982) in which the Board found that the press room department employees shared a distinct community of interests. In that case they found that the pre-press or preparatory department employees did not share a community of employment interest. There, as in the instant case, the press room employees were found to have little contact with other employees, and there was virtually no transfer of employees between departments. In the instant case there is no significant interchange of

employees. Further, in that case, as in the present case, the press room employees had shift times different from the preparatory employees; and the press room employees, unlike the preparatory employees, wore uniforms and had access to different areas of the employer's facility.

Although the unit composition herein departs from the traditional unit which includes preparatory employees, the facts herein mandate such a departure. In *Moore Business Forms, Inc.*, 216 NLRB 833 (1975), a case involving a traditional lithographic unit, the pre-press or preliminary employees worked under common supervision with the press room employees on two of the three shifts. Furthermore, the pressmen's duties included cutting and correcting plates, which required frequent trips into the preliminary area. Preliminary employees were continually in the press area working on jobs, delivering plates and materials, and obtaining information for their work. Preliminary employees also performed specification checks and roll proofreading in the press area. The differences between the fact situation therein and that which confronts us here are obvious and striking.

Consequently, on the basis of the above and the record as a whole, I conclude that the press room employees herein possess a separate and distinct community of employment interests and that a unit composed exclusively of them constitutes a unit appropriate for purposes of collective bargaining. I shall direct an election in that unit.

As noted above the press room department includes the classification of pressman trainee. Currently, there is one employee so designated. Although neither party has taken a position with respect to the eligibility of this

employee, it is clear that after completing the three year training program the individual will become a press operator. Therefore, I have determined that this employee shares a community of employment interests with the other press room employees, and I shall include the trainee in the unit.

At the hearing the parties stipulated and I find that David Tremonti, vice president and operations manager; Gail Tremonti, treasurer; Scott Shaffer, pressroom supervisor; Frank Skwiera, plant superintendent; Lisa Bartkiewicz, computer operator; Joy Lajiness, receptionist; and David Allen, security guard, are ineligible to vote in the election.